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EGBA DRAFT OF CODE OF CONDUCT

Opinion about the draft

25/02/2020

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Privanova's Opinion

on the draft Code of Conduct proposed by European Gambling and Betting Association (EGBA)

Introduction

The GDPR might be described as the general privacy framework with widespread application. It is a general source of data protection regulation composed of many provisions, and some of them are kept in an abstract form and their further clarification and development are desirable. The development of self-regulation might be taken as one of the accountability pillars. Therefore, the GDPR introduces the codes of conduct as a data protection mechanism that belongs to the self-regulation domain. The representative bodies of controllers and/or processors, like industry associations, are encouraged to create proposals for codes of conduct on any aspect of data protection and processing. The draft of code should be approved by competent data protection supervisory authority (or authorities), and subsequently enforced. Enforcement may be monitored by a body that has an appropriate level of expertise in relation to the subject-matter of the code and is accredited for that purpose by the competent supervisory authority.

The initiative taken by EGBA to develop the code of conduct that will regulate data protection/processing matters in the industry of online gambling service providing ('industry') is an example of positive practice. However, we have noticed important areas that would require improvement or additional explanation in the draft of code. In order to contribute this initiative is providing our opinion about the draft of the code that might be found in the text below.

Material scope of the draft of code

According to our view, the main goal of the Code of Conduct is to regulate the application of GDPR provisions into specific industries or sectors. For that purpose, a code should consider specifics of the industry that affect personal data processing and subsequent protection of

personal data and privacy. Unfortunately, the current draft of the code explains the main principles, rights, and obligations as they are already defined and explained by the GDPR. The current text cannot be considered as self-regulation due to a lack of specific regulatory features valid for the industry. We would like to point out several areas where the industry-related approach is welcome.

AML and Data protection regulation

A large-scale processing of personal data could jeopardize industry customers' personal privacy. Thus, the question arises as to whether there is an essential conflict between the right to the protection of personal data and the protection of customers and public interests from gambling-related harms. Relevant European institutions (e.g. European Data Protection Board) have confirmed that there are complex relations between compliance needs of gambling-related regulations (e.g. licensing legislations, Anti Money Laundering legislation (AML), responsible gambling legislation and regulation) on one side, and Data Protection Regulation on other. In practice, gambling service providers are obliged to collect/process broad scope of gamblers' personal data in order to satisfy requirements of gambling-related regulations (by doing so they apply data maximization principle). However, in that way they expose themselves to data protection compliance risks (due to potential breach of data minimization principle that is one of the foundations of the GDPR).

Having a proper balance among regulations with opposed goals concerning the scope, nature, purpose, and context of personal data processing is a considerable challenge. Nevertheless, the Code of Conduct could be a regulatory means specifically tailored to overcome this problem. Therefore, the Code of Conduct could regulate operators' flexibility in processing personal data as it would be necessary to meet extensive regulatory obligations such as those deriving from AML legislations.

Storage limitation

The storage limitation principle imposes the obligation to retain personal data only for a period that would be necessary to achieve the purpose of personal data processing. Afterward, data must be erased. Considering the context of gambling service and different requirements to retain the data, it would not be wrong to claim that there is inconsistency in data retention

periods. Namely, operators do not have common stances at the moment when the data retention period starts as well as the duration of the retention period. The Code of Conduct could serve as a source that will shed a light on these matters. Notwithstanding data protection authorities' positions on the application on storage limitation principle, the industry should clearly define its' main common grounds and reasons for keeping data for a certain period, such as the ones to properly satisfy AML laws requirements as well as other legislative needs.

Responsible gambling and data processing

Nowadays, responsible gambling is seen as a multifold concept that encompasses a broad spectrum of activities in favour of customer protection. It is supposed to be a guardian of both the personal and social spheres, shielding individuals and society from gambling-related harms and problem gambling. Thus, various measures might be applied for the benefits of responsible gambling including those which application is based on systematic and regular monitoring of customers on a large-scale. Therefore, several legal grounds might be options to ensure the lawful processing of customer' data when responsible gambling measures are applied and the Code should explain potential approaches. The application of privacy-invasive strategies, tactics, and measures are not necessarily unlawful. However, the industry should advocate for the application of these strategies and present plausible evidence that their application is still legal. The Code of Conduct might be a relevant source that would legitimize application privacy-invasive approaches that would strengthen responsible gambling. Nevertheless, the privacy-invasive approach should exist in a controlled environment that provides sufficient guarantees to protect the fundamental right and freedoms of data subjects. Thus, the Code might at least shape the bottom-line of the environment considering the industry specifics.

Responsible advertising and data protection

Responsible advertising does not deprive online gambling service providers of the possibility of advertising their services but, rather, makes them engage with commercial communication in a more responsible manner. For the matter of legal certainty service providers should know whether, when and to whom commercial communication should be sent. It is a very specific

feature of the industry that the content of advertisements might be often contested. Also, it often cases that the legal ground for lawful processing of personal data for commercial communication purposes, particularly for digital marketing purposes, is disputable. The overall complexity is contributed by the application of responsible gambling measures (e.g. self-exclusion mechanism).

Therefore, the draft of code might contain a proposal for specific regulation of personal data protection/processing concerning gambling-related advertising or direct marketing activities. This section might include provisions about automated decision making, including profiling.

Territorial scope of the code and its approval

Considering the fact that EGBA is a representative body of online gambling service providers that are licensed and established in Europe, then the size of this organization, the number, and size of EGBA members, this organization is indisputable representative of the industry of online gambling service providing. Therefore, this organization has the legitimacy to work on the development of self-regulation regarding personal data protection, including the development of the Code of Conduct.

The complex corporate structure of EGBA and its members might affect the approval of the conduct. According to our view, Belgium supervisory authority supposed to be a competent authority to examine and approve the draft code. If the EGBA has different interpretation of this requirement this should be addressed and explained in the Code (why and how EGBA decided to submit the draft code to Malta Data Protection Authority). In addition, if the draft code relates to processing activities in the several Member States (that is more than obvious due to composition of the industry representatives that are EGBA members), the competent supervisory authority should submit the draft code to other supervisory authorities that might object the draft code. Any potential disagreement between the lead supervisory authority and other supervisory authority might initiate dispute resolution activities by the European Data Protection Board. Finally, if the draft code regulates international data transfer, then even the European Commission interference is necessary for the approval of the draft code. If the draft code will serve for this purpose, then data controllers or processors in third countries will have to provide binding and enforceable commitments that they will apply the code.

Due to complex corporative structure that might not match with data governance structure, and complex approval mechanism that includes a considerable number of national and the EU institutions, it is desirable to be aware in advance about the following:

- The data governance structure of each member of the EGBA
- National and the EU institutions that will be included in the approval of the draft code
- Competent supervisory authority that would be asked for approval of the draft code

Monitoring of the code

The characteristics and tasks of the monitoring body are set out in the GDPR (art 41.). The body has to prove its independence and expertise as well as to be able avoid conflicts. This body should have procedures for effective monitoring of compliance and for dealing with complaints. Also, it has to be able to take appropriate action against any infringements. Of course, the DPAs do not abandon their supervisory and enforcement roles by approving codes and monitoring bodies. They retain their jurisdiction over the subject matter covered by codes and the controllers and processors that have undertaken to follow them.

We think that it would be desirable to create monitoring body that will oversee the described tasks. This body will be a guardian of the code and force that contribute general compliance standards in the industry.

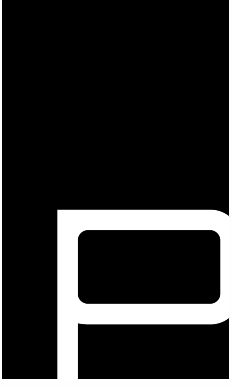
Concluding hints

From the above presented, we would like to underline the most important suggestions/advises:

- Rethink about the material scope of conduct. We think it would be more feasible to create sectorial code that will regulate a few areas (that are on the intersection of gambling-specific regulation and data protection/processing) than to rely on one-size-fits-all regulatory solution
- Try to determine regulatory priorities in order to focus on the hottest problems
- Try to investigate the feasibility of self-regulation. For this purpose, we advise the following:
 - investigate the common regulatory standards in all EU countries applicable to the

industry operations

- investigate what might be the common regulatory stances (in non-harmonized regulations)
 - investigate the industry best practice
 - carry out comparative analysis of existing codes of conduct, or draft codes that are on pending for approval
- Decide whether the code will serve as appropriate safeguard for international transfer of data
 - Create an action plan concerning approval of the draft of code and potential application of consistency mechanism



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